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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 901

JOEY GOLD and NEW YORK TICKET BROKERS, INC., on behalf of itself and its members,

Appellants,

v.

JOSEPH C. DI CARLO, as Commissioner of Licenses of the City of New York, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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IN THE

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No. 901

JOEY GOLD and NEW YORK TICKET BROKERS, INC., on behalf of itself and its members,

Appellants,

v.

JOSEPH C. DI CARLO, as Commissioner of Licenses of the City of New York, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee, Louis J. Lefkowitz, Attorney General of the State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the three-judge District Court be affirmed or in the alternative that this appeal be dismissed.

Statutes Involved

Sections 167, 169-c of Article X-B of the General Business Law of the State of New York; United States Constitution, Fourteenth Amendment, § 1, the text of which is set forth in Appendix B of appellants' Jurisdictional Statement.

Questions Presented

1. Is the State of New York, under the theory of *res judicata*, precluded from regulating the re-sale price of theatre and sports tickets (General Business Law § 169-c) because the 1927 decision of *Tyson and Brother* v. *Banton*, 273 U. S. 418 has not been specifically overruled, despite the fact that the fictional test of the standard set forth in that case, i.e.—in order for a state to regulate business it must be "affected with a public interest"—has since been rejected by innumerable subsequent decisions of this Court starting with *Nebbia* v. *New York*, 291 U. S. 502 (1934), and most recently *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963), all clearly holding that the philosophy or test as stated in *Tyson* has been completely abandoned and repudiated by this Court?

2. Does the method of regulation of the re-sale price of sports and theatre tickets, as embodied in § 169-c of the General Business Law of the State of New York, bear a rational relation to the constitutionally permissible legislative purpose expressed in § 167 of the General Business Law?

Statement of the Case

The State of New York, through § 169-c of Article X-B of the General Business Law, regulates the price at which licensed brokers may re-sell tickets to theatres and other places of public amusement. This section makes it unlaw-

ful to re-sell a ticket to any theatre, sporting event or other public amusement event at a price more than $1.50, plus lawful taxes, in excess of the maximum price printed on the ticket.* The legislative purpose, expressed in § 167 of Article X-B of the General Business Law, declares that the admission price for public amusement is "a matter affected with a public interest" and is subject to supervision and regulation to safeguard the public "against fraud, extortion, exorbitant rates and similar abuses."

Appellant, Joey Gold,** a licensed ticket broker and appellant, New York Ticket Brokers, Inc., a membership corporation of licensed brokers, sought to enjoin appellees from enforcing § 169-c against ticket brokers and also sought a declaratory judgment that the statute is unconstitutional under the Fourteenth Amendment of the federal Constitution.

In 1927, this Court, in *Tyson and Brother* v. *Banton*, 273 U. S. 418 held that the State of New York lacked power to regulate re-sale prices of theatre and sporting events

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* The statute involved in *Tyson* set a ceiling of 50¢. This was repealed by Laws of 1937, Ch. 699, following *Tyson*. The Laws of 1940, Ch. 614, Section 1, the Legislature re-enacted legislation fixing a ceiling of 75¢; in 1954 the ceiling was raised to $1.00 (L. 1954, Ch. 94); in 1957 the ceiling was raised to $1.25 (L. 1957, Ch. 648); and in 1960 the present statute was enacted by the Laws of 1960, Ch. 902 raising the ceiling to $1.50.

** In a supplemental affidavit to the complaint, appellant Gold indicated that proceedings had been instituted by the District Attorney of New York County against him and other brokers for violation of Section 169-c of the General Business Law. In fact, an information had been filed against appellant Gold in the Criminal Court of the City of New York, County of New York charging him with violation of Section 169-c. Subsequent to the disposition by the Three Judge Court in this case, this appellant Gold, on December 8, 1964, pleaded guilty to four counts of the aforesaid information. This followed an extensive theatre investigation conducted by the State as a result of which additional legislation was enacted regulating theatrical syndication financing (L. 1964, Ch. 728, Section 1, eff. June 1, 1964; now General Business Law, Article 26-A, McKinney's Consol. Laws of New York, Book 19).

tickets because they were not deemed by this Court to be matters "affected with a public interest" and thereupon declared unconstitutional the predecessor of present § 169-c. The appellants contend that since the *Tyson* case has never been explicitly overruled the merits of that decision may not be challenged because, under the doctrine of *res judicata*, the Attorney General of the State of New York is bound by that holding (6-9).***

Appellants in also challenging the constitutionality of § 169-c do not question the power of the Legislature to legislate in this area, but contend that the provisions of 169-c are not reasonably related to the legislative purpose set forth in § 167 and is discriminatory against theatre ticket brokers, thereby violating the Fourteenth Amendment of the Constitution (11). Nor do they question that the Legislature had before it evidence of abuses in the distribution and sale of tickets for public amusement performances (11).

Opinion Below

The Court below rejected both positions taken by appellants. It held that the *res judicata* argument must fall because the philosophy of *Tyson* has been so completely repudiated that the Court would be abdicating its judicial responsibility if it were now to follow *Tyson* merely because the words, "we hereby overrule *Tyson*" were not specifically and expressly used by this Court in its subsequent decisions which rejected the "fictional test" originally expounded in *Tyson*. Quite correctly, it is submitted, the Court below characterized *Tyson* as an "illusory barrier". As the Court pointed out, "in the constitutional area the considerations of finality that stand behind the *res judicata* doctrine must be balanced against and oftimes give way

*** Figures in parentheses refer to pages in appellants' jurisdictional statement unless otherwise indicated.

to government's need to regulate abuses that change with the passage of time".

With equal clarity the Court below rejected appellants' challenge to the statute as being violative of the Fourteenth Amendment. In so doing the Court did nothing more than follow the well established principle so often enunciated by this Court that the courts no longer resort to the due process clause as a weapon "to strike down state laws, regulatory of business * * * conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955)". The Court interpreted the declaration of purpose as stated in § 167 to be an expression of legislative concern with a price the public *ultimately* pay for theater tickets and concluded that it was for the Legislature to determine the most effective method of accomplishing its objective. Thus, if the Legislature thought that the whole field of possible abuses need not be covered, it is not for the Court to say that other areas must also be regulated.

Finally, in addressing itself to the charge of unfair discrimination the Court once again followed well established Hornbook law that in order to establish discrimination one must show that he belongs to the same class as those allegedly receiving preferential treatment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). It was found that appellants could not meet this requirement since § 169-c operates alike upon all ticket brokers who clearly fall within a reasonably distinguishable class.

ARGUMENT

No substantial federal question is presented by this appeal.

A

"The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of the court so as to foreclose the subject". It is difficult to conceive of a more appropriate statement of the principle applicable to the case at bar than the aforementioned quotation from *California Water Service Co.* v. *Redding*, 304 U. S. 252, decided by this Court in 1938.

The 1927 5 to 4 decision of *Tyson and Brother* v. *Banton*, 273 U. S. 418 (1927) invalidated a legislative attempt to control the re-sale price of tickets in New York State. The majority opinion stressed the fact that price fixing is proper where the business or property involved has become "affected with a public interest". The Court held that the re-sale of theater tickets was not a business affected with the public interest and was therefore, not subject to price control. Mr. Justice Holmes dissented, stating that "the Legislature may forbid or restrict any business when it has a sufficient force of public opinion." This dissent has since become the law.

Following the *Tyson* decision the statute therein involved was repealed by the New York Legislature. What is being challenged here is a new statute enacted years later in 1940 following the later pronouncements by this Court. The 1940 statute presently before this Court was the subject of challenge in the state courts in *Kelly—Sullivan* v. *Moss*, 174 Misc. 1098 (1940), 22 N.Y.S. 2d 491, aff'd 260 App. Div. 921 (1st Dept., 1940), 24 N.Y.S. 2d 984 and *Kelly—Sullivan, Inc.* v. *Moss*, 180 Misc. 3 (1943), 39 N.Y.S. 2d 797. There the Court, on two occasions, rejected the attack

predicated principally in reliance upon the *Tyson* case passing upon the earlier statute and held the 1940 statute constitutional.

Reference need be made to but a few cases of the many decided by this Court in this area to show that *Tyson* has been so effectively overruled as to make any reliance on it devoid of any possible merit. In *Nebbia* v. *New York*, 291 U. S. 502 (1934) this Court upheld the authority of the states in the exercise of police power to fix rates, prices and commissions and held that the regulations by the State of New York of the price of milk was consistent with the Fourteenth Amendment. As the Court below indicated, *Tyson's* fictional test was rejected in *Nebbia*. The approval of the doctrine in *Nebbia* was reaffirmed in *Olsen* v. *Nebraska*, 313 U. S. 236 (1941) which referred to both *Ribnik* v. *McBride*, 277 U. S. 350 (1928) and *Tyson*, stating in effect that the principle enunciated in *Tyson* no longer applies.

Many cases followed wherein this Court rejected *Tyson* and reaffirmed the principle of *Nebbia* and *Olsen*. However, to complete a trilogy we advance to 1963 and the case of *Ferguson* v. *Skrupa*, 372 U. S. 726. There, in its discussion of the due process clause, this Court noted that there was a time when the due process clause was used to strike down laws incompatible with some economic or social philosophy, citing *Tyson* and the Holmes dissent. However, the Court continued, the cases make it clear that the doctrine of due process authorizing courts to hold laws unconstitutional when they believe the Legislature has acted unwisely has long since been discarded and the courts are no longer concerned with either the wisdom or need or appropriateness of the legislation.

It is submitted that in such posture the insubstantiality of the alleged due process question is clear beyond doubt. In light of the foregoing it is inconceivable that appellants would suggest to this Court, at this late date, that until

Tyson is specifically overruled it is to be deemed controlling in this case. Similarly, the tenuous theory of *res judicata* relied upon by appellants is obviously without merit; indeed, it is frivolity of the plainest sort. The validity of the view of constitutional law enunciated by this Court on numerous occasions subsequent to *Tyson* and clearly applicable to the case at bar, is so firmly established as to be beyond plausible dispute. Appellants' reliance upon *Tyson* as controlling herein, under any theory, is entirely misplaced and the cases cited by them are not in point. More applicable is the long established principle that where subsequent decisions of the same court are not in harmony with prior decisions the later decisions have the effect of overruling the prior ones, even where not mentioned. See e.g., *Asher* v. *Texas*, 128 U. S. 129 (1888).

B

In view of the principles enunciated in the numerous cases decided by this Court in the area now under discussion, culminating in the broad declaration stated in *Ferguson* v. *Skrupa, supra*, it is untenable to suggest that the treatment by New York of the sale of amusement and sports tickets is arbitrary and that the provisions of the statute are not reasonably related to the legislative purpose. Such a contention fails to raise a substantial federal question since it is obviously entirely devoid of any merit. This is apart from the fact that the exact question was raised and the identical arguments were made, unsuccessfully in the two *Kelly-Sullivan* v. *Moss, supra*, opinions by the State court more than 20 years ago. In the absence of any change in court pronouncements, and there are none, favorable to appellants there can be no substantial question requiring or justifying review or re-examination at this time. In passing it should be noted that the challenge to the evils and abuses in this field were also dismissed in the pre-*Tyson* case of *People* v. *Weller*, 237 N. Y. 316 (1924), 143 N. E. 205, aff'd *sub nom. Weller* v. *New*

York, 268 U. S. 319 (1925), upholding *licensing* of theatre brokers.

The Legislature has expressly declared in Gen. Bus. Law, § 167 that the price of theather tickets "is a matter affected with a public interest and subject to the supervision of the appropriate political subdivisions of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rate and similar abuses". Such declaration, as *Ferguson* v. *Skrupa, supra,* holds is not to be questioned by a difference of opinion as to the efficacy or wisdom of the means devised by the Legislature to promote the public interest in this regard.

As that case holds, the time has passed when Courts will employ the Due Process or Equal Protection clauses of the Constitution to challenge state laws because such laws may be deemed unwise, improvident or out of harmony with a particular school of thought. See also *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955); *Day-Brite Light, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952); *Goesaert* v. *Cleary*, 355 U. S. 464, 467 (1948); *Daniel* v. *Family Ins. Co.*, 336 U. S. 220, 224 (1949); *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192 (1912); *Beauharnais* v. *Illinois*, 343 U. S. 250, 262 (1952). See, too: *Ticket Clubs of New Jersey, Inc.* v. *O'Connell*, 8 Misc. 2d 519 (Sup. Ct., N. Y. Co., 1957), 166 N.Y.S. 2d 294, aff'd 4 A. D. 2d 938 (1st Dept. 1957), 167 N.Y.S. 2d 1000, lv. to app. den. 5 A. D. 2d 767, 170 N.Y.S. 2d 977.

Since the statute in question encompasses the entire area of ticket sales, there can be no factual basis for even injecting a Fourteenth Amendment argument. The separate grouping of ticket resellers cannot be challenged as discriminatory. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn., Inc.*, 360 U. S. 334 (1959); *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 151 (1938); *Goesaert* v. *Cleary, supra,* 335 U. S. 464 (1948); see also *Bowles* v. *Willingham*, 321 U. S. 503 (1944).

That the Legislature has not fixed the ceiling on the box office price of theater tickets furnishes no ground for arguing discrimination. The Legislature determined to deal only with the evils arising in the resale of tickets. It has been consistently held that the fact that the Legislature does not occupy the entire area raises no Fourteenth Amendment question. *West Coast Hotel Co.* v. *Parrish, supra,* 300 U. S. 379 (1937); *Four Maple Realty Co.* v. *Abrams,* 2 A. D. 2d 753 (2nd Dept., 1956), 153 N.Y.S. 2d 747 app. dism. 2 N. Y. 2d 837 (1957), 159 N.Y.S. 2d 976, 355 U. S. 14 (1957); *National Psychological Assn.* v. *University of State of New York,* 8 N. Y. 2d 197 (1960), 168 N. E. 2d 649, app. dism. 365 U. S. 298 (1961). (Note that in the Fair Trade cases the argument was also unsuccessfully made that the Legislature failed to control the price of the manufacture or wholesaler. *Old Dearborn Corp.* v. *Seagram Corp.,* 299 U. S. 183 (1936); *General Electric Co.* v. *Masters, Inc.,* 307 N. Y. 229 (1954), 120 N. E. 2d 802, app. dism. 348 U. S. 892 (1954). Nevertheless, the statute does require that the established price of the tickets (and the service charge by brokers) be posted on the ticket, so that there can be no discrimination. To that extent, the theatre owners too, are subject to restrictions under the statute. Whether based on Due Process or Equal Protection contentions, it is beyond plausible dispute that the constitutional challenge is wholly devoid of any colorable merit.

CONCLUSION

The District Court correctly determined the issues involved. This appeal presents no substantial constitutional question. The judgment should be affirmed or the appeal dismissed.

Dated: New York, New York, March 2, 1965.

Respectfully submitted,

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